

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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IN RE: ALPENE, LTD., :  
: 21-MC-2547 (MKB) (RML)  
:  
: January 11, 2022  
:  
: Brooklyn, New York  
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TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT  
BEFORE THE HONORABLE ROBERT M. LEVY  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 THE COURT: This is Judge Levy. Good  
2 morning again. We're here on docket number 21-MC-2547,  
3 In Re: Alpene, A-l-p-e-n-e.

4 Will counsel please state their appearances  
5 for the record?

6 MR. DAVIDSON: This is Steven Davidson from  
7 Steptoe & Johnson on behalf of Alpene. With me is one  
8 of my colleagues from D.C., Teddy Baldwin, and two New  
9 York colleagues, Evan Glassman and Niati Ahu (ph).

10 THE COURT: Thank you.

11 MR. KEATS: Good morning, your Honor. It's  
12 Michael Keats from Fried, Frank for the respondent,  
13 Elizabeth McCaul. With me are a few individuals I need  
14 to introduce. Stacey Blaustein (ph) and Joy Willing  
15 (ph) are both in-house lawyers at IBM and they cover  
16 Promontory Financial. You can understand why they are  
17 involved in this with Promontory all over the papers.

18 THE COURT: Good.

19 MR. KEATS: And my colleague, Justin  
20 Santolli from Fried Frank as well.

21 THE COURT: Who is going to be speaking for  
22 the movant and who is going to be speaking for the  
23 respondent?

24 MR. KEATS: This is Michael Keats. I'll be  
25 speaking for the movant.

1 MR. DAVIDSON: Your Honor, it's Steven  
2 Davidson speaking on behalf of Alpene.

3 THE COURT: All right. Mr. Keats, do you  
4 want to go first?

5 MR. KEATS: Sure, sure. Good morning and  
6 thank you for hearing us on this motion. I know you've  
7 gotten a pile of paper from both sides so I'm not going  
8 to repeat everything you've read. The procedural  
9 posture is, we have moved for a protective order. The  
10 applicant Alpene is seeking discovery pursuant to  
11 Section 1782 in connection with a treaty arbitration  
12 that they have filed against the government of Malta.

13 Elizabeth McCaul, my client, at the time of  
14 the underlying events worked for Promontory. She was  
15 the CEO. Promontory has been an advisor/consultant to  
16 the Malta Financial Services Authority, the MFSA, for  
17 many years going back to at least 2012. We have come  
18 before you and we're seeking this relief for all the  
19 reasons we've put forward, but I want to kind of  
20 highlight a couple of things. When I first got this  
21 paper, their motion papers, I thought I understood what  
22 was going on, but I did a Google search and found that  
23 there had been a prior proceeding basically by the same  
24 parties in interest that had been filed in the District  
25 of New Hampshire because there's a gentleman named

1 Laurence Conell (ph), who had served when Ali Sader  
2 (ph) -- there are a lot of names here, forgive me --  
3 was arrested in the U.S. for alleged money laundering,  
4 among other things. The MFSA made the decision to put  
5 the bank that he owned and he was the chairman of, and  
6 he's to my knowledge the sole owner of that bank, into  
7 administration upon learning that Mr. Sader had been  
8 arrested and detained in the United States.

9 My client's role, and that's Elizabeth  
10 McCaul, appears to be she gave the name of Laurence  
11 Conell among others to the MFSA as potential candidates  
12 to serve as what's known as a competent person who  
13 effectively administers the bank instead of its  
14 shareholders, its board of directors. That's sort of  
15 at a very high level the background. The MFSA's  
16 decision to do that is something that Pilatus (ph) Bank  
17 and Ali Sader have been challenging through litigation  
18 against various parties, the MFSA, the European Central  
19 Bank, for some years, and now they brought a claim  
20 against the government of Malta. So very high-level  
21 background.

22 The specific reasons -- look, we were -- I  
23 was surprised, candidly, that the prior Conell  
24 litigation was not mentioned at all in the application.  
25 And even now, I think Alpene has tried to disown it as

1 sort of, it was filed by their lawyers, it's a  
2 different party, but the fact of the matter is, Ali  
3 Sader is and Pilatus Bank and Alpene are all the same  
4 and they're run by the same people. The firm here,  
5 Steptoe & Johnson, representing the applicant is the  
6 same firm that defended Ali Sader in his criminal case,  
7 and they filed a letter in support of the Conell  
8 application in New Hampshire. So they were fully aware  
9 of it, they participated in it, and the question of  
10 course is, why wouldn't you disclose something so  
11 obvious as a prior proceeding where they were seeking  
12 essentially much of the same information from Mr.  
13 Conell and his role as the competent person, why  
14 wouldn't you disclose that?

15 Here, where you're talking about someone,  
16 Elizabeth McCaul, who is many steps removed, did not  
17 have a role in the administration of Pilatus Bank, and  
18 a lot of the argument and rationale -- the answer is  
19 simple. I think the judge did a pretty good job of  
20 explaining why the discovery being sought against Mr.  
21 Conell, which should apply with greater force here, was  
22 inappropriate. So we have filed that motion and I'm  
23 happy to take the Court through our arguments.

24 One thing I also want to flag is, subsequent  
25 to the application, the Supreme Court has taken cert.

1 on a couple of issues that are relevant to this  
2 petition, one of which will address the question of  
3 whether international arbitrations, commercial  
4 arbitrations qualify as foreign proceedings that are  
5 part of -- part of the statute. In addition, the  
6 Supreme Court took cert. in connection with that case  
7 on a treaty arbitration. It's the Alex Partners case,  
8 where they will address the issue of whether or not  
9 treaty arbitrations, investor treaty arbitrations  
10 between countries, which look a lot like private  
11 arbitration -- they're private arbitrators, they're  
12 private bodies -- are within the statute's ambit.

13 So, you know, while I'm happy to argue all  
14 of our positions, it occurs to me, out of efficiency,  
15 out of just trying to narrow the issues, the  
16 arbitration in my understanding in Malta has not really  
17 commenced. There's no panel, they haven't done  
18 anything. There's no schedule. The Supreme Court is  
19 hearing that case this term, those cases this term.  
20 They will decide obviously by June. It occurs to me  
21 that one might consider it makes sense to stay this  
22 entire proceeding pending the outcome of that because  
23 if this -- the proceeding here is under the investment  
24 treaty between Malta and China, which is pretty similar  
25 to the proceeding at issue in the Alex Partners case,

1 which I think involves Lithuania, and it would resolve  
2 the issue entirely.

3 I will note that the Solicitor General  
4 really pushed to have the court hear that companion  
5 case, the treaty arbitration, because it raises  
6 fundamental issue of comity among countries that, when  
7 they've been doing investor treaties in recent years,  
8 probably did not realize that the full panoply of U.S.  
9 discovery might very well be pulled into those  
10 proceedings, which is kind of what's at issue here.  
11 But that's sort of, you know, to kind of lay the  
12 framework. And, again, I'm happy to go into the  
13 substance but I do want to raise that as a concern.

14 You know, the other thing that's hanging  
15 over the papers is, why is Alpene seeking testimony  
16 that pretty clearly is far removed from the claims  
17 against Malta? The claims are for expropriation and  
18 disproportionate treatment. By the way, those are some  
19 of the same claims that Pilatus Bank brought against  
20 the ECB in their nullification proceeding. They're  
21 very similar. It's kind of interesting because if you  
22 look at Judge DiClerico's (ph) decision on the Conell  
23 case, he actually concluded very clearly that the  
24 discovery, among other things -- he had many  
25 conclusions in that opinion, but one of them was that

1 the discovery that they were seeking as to Conell was  
2 far removed from any of those kinds of claims. It was  
3 not relevant and therefore, it was hard to see how it  
4 could be used in a foreign proceeding, another  
5 mandatory requirement of the statute. And I can point  
6 the Court to the relevant pages but for the record,  
7 I'll just read it.

8           They say, "Pilatus has not shown how the  
9 discovery it seeks from Conell is relevant to the  
10 claims brought in the annulment action." I'll skip  
11 over the cite. "The eleven claims are brought against  
12 the ECB but the information Pilatus seeks from Conell  
13 focuses on the MFSA's actions and motives, Conell's  
14 qualifications for appointment as competent person by  
15 the MFSA, instructions from the MFSA, and his actions  
16 as competent person. Pilatus makes no effort to show  
17 how the information it seeks from Conell is relevant to  
18 specific claims or issues in the annulment action  
19 against ECB and Conell denies any relevance."

20           That really is the circumstance we find  
21 ourselves in. Ms. McCaul did not -- was not the  
22 competent person. She did not pick the competent  
23 person. Apparently, it was picked by the MFSA. I know  
24 Alpeine has tried to blur that. I don't know why but I  
25 also don't know why they didn't disclose this prior



1 case, either, other than, you know, it's kind of a  
2 sharp practice where they're trying desperately to get  
3 something here that I can only speculate about. But  
4 when I see, your Honor, Promontory featured all over  
5 the pleadings, including the arbitration demand that  
6 was filed and some of the supporting documents, making  
7 completely unsupported accusations against Promontory.  
8 One has to wonder whether this is all about getting  
9 pre-dispute discovery, which plainly is not a proper  
10 purpose for Section 1782 discovery.

11 I would also note that, you know, there has  
12 been an indictment in Malta against Pilatus Bank and I  
13 think the person who was the chief compliance officer,  
14 and I read this week that an arrest warrant had been  
15 issued back in March of last year for the arrest of Mr.  
16 Sader. So I don't know what the ultimate -- what the  
17 ultimate goal of any of these proceedings may be, but  
18 my understanding is Mr. Sader is in the U.S. And in  
19 theory, if the Maltese government proceeds against him,  
20 they will probably seek to extradite him. One ground  
21 for avoiding extradition in the treaty between Malta  
22 and the U.S. is a political fight, which expropriation  
23 certainly might fit that.

24 So we are worried that the plaintiffs have  
25 -- sorry, that Alpene has not been transparent about

1 what's going on here, including by the fact that they  
2 didn't mention the District of New Hampshire case,  
3 including the way they've been misrepresenting our  
4 client's role in it. We don't know why they're doing  
5 this but it is far removed. It does not meet, in our  
6 view, the mandatory statutory requirements, let alone  
7 the discretionary requirements. But why don't I pause  
8 there because I've been monologuing a little bit, and  
9 I'm happy to answer any questions.

10 THE COURT: May I hear from opposing  
11 counsel, and then I'll have some questions.

12 MR. KEATS: Sure.

13 MR. DAVISON: Sure, your Honor, thank you,  
14 your Honor. Again, this is Steven Davidson on behalf  
15 of Alpene, the party in the arbitration and the party  
16 here seeking discovery.

17 On a big-picture level, the factual pattern  
18 that was communicated to you is somewhat accurate, but  
19 there are obviously many disagreements we have with  
20 what you heard. Alpene is a claimant in an  
21 international arbitration against Malta, and it's  
22 important for one of the points, that is the pending  
23 Supreme Court case, that this is before the World Bank  
24 Center for the resolution of investment disputes, a  
25 quasi-government agency, and Alpene is the owner of the

1 bank, the indirect and ultimate owner of the bank that  
2 was seized by Malta.

3           Your Honor, I think it's important to  
4 remember the fundamental allegations that we have made  
5 in the investment treaty case, which we believe will be  
6 proven by the facts and evidence of our arbitration.  
7 The wrongful measures taken by the Maltese government  
8 include dissipating the assets of the bank, depriving  
9 Alpene of any indirect shareholding rights of ownership  
10 control of the bank and transferring all of the assets  
11 of the bank to the Maltese government.

12           Essentially, your Honor, we're saying that  
13 this was a political act, trumped-up actions by the  
14 Maltese government to strip Alpene of its ownership  
15 interest and rights in the bank. In trying to prove  
16 our case, we need evidence, and some of this evidence  
17 is unavailable through the treaty sources, that is the  
18 ICSID panel that has actually been convened. The full  
19 panel has been put together and we're scheduled to have  
20 a procedural conference sometime in February, so that  
21 case is moving along.

22           And one of the pieces of evidence that we  
23 need is, how did this competent person, Mr. Conell, end  
24 up being put essentially in charge of this bank, and  
25 that those actions at the very beginning of the

1 takeover of the bank are fundamental to our case  
2 because, although the bank had been cleanly regulated,  
3 shown to be a sufficient depository institution through  
4 various reviews, Mr. Sader was indicted for charges  
5 unrelated to the bank and was immediately removed from  
6 the bank. And Promontory and its allies at the MFSA  
7 immediately moved in, just on the basis of this  
8 indictment, to take over the bank. That's fundamental  
9 to part of our case, your Honor, because eventually, as  
10 you've seen from the papers, the conviction was thrown  
11 out and exculpatory evidence was withheld, such that  
12 Judge Nathan concluded that if this evidence had been  
13 presented, it's highly probably that no case could have  
14 ever been brought, and the case was dismissed with  
15 prejudice.

16 In terms of what we seek here and why we  
17 seek it, McCaul was the primary point of contact with  
18 Promontory. She submitted a declaration which we would  
19 respectfully suggest that your Honor read. She admits  
20 a fair amount of what we've suggested and has claimed  
21 privilege while at the same time putting in this  
22 declaration, which we think is classic sword-and-shield  
23 and also amounts to a waiver of any banking privilege  
24 that she would claim, which we would submit is not  
25 sustainable.

1           But as the evidence we presented to your  
2 Honor we believe proves, McCaul was a primary point of  
3 contact with Promontory, with Conell. She briefed him  
4 for several hours with respect to his work at the bank  
5 before he began his assignment. She appears to have  
6 selected two other Promontory persons to work with  
7 Conell. She appears to have directed Conell and the  
8 Promontory persons that were purportedly managing the  
9 bank and at least in one instance that we found, and  
10 this is just on the information we've been able to  
11 ascertain, was involved in activities months later  
12 involving know-your-customer reviews that were  
13 undertaken six or seven months after Conell was  
14 appointed.

15           Fundamental to our case, your Honor, are the  
16 actions taken at the outset of this action by Malta in  
17 taking over the bank and dissipating the assets of the  
18 bank. These events started with the identification of  
19 Conell and discussions with Conell about his position  
20 managing at the bank. Your Honor, we don't have to  
21 rely on speculation as to that. Mr. Conell testified  
22 in an arbitration proceeding in Malta, not our case but  
23 in a different case that was brought by board members  
24 of the bank as against the MFSA. Our client, Mr.  
25 Sader, who we did represent in the criminal case, was

1 not a party to that and is not a party to the ECJ case  
2 also pending. In that Maltese arbitration, Mr. Conell  
3 testified, and we've exhibited his testimony to the  
4 Baldwin declaration of Exhibit 20, the second Baldwin  
5 declaration that was submitted, your Honor.

6 That is important for a couple of reasons:  
7 One, as to the decision in New Hampshire, the principal  
8 reason why the judge there rejected the application  
9 made to have testimony taken by Mr. Conell was that he  
10 had been deposed and his evidence had been available.  
11 And secondly, the judge there concluded, as you can see  
12 from the reported decision, that there was likely no  
13 more evidence to be taken in the case -- the foreign  
14 proceeding, the support with which was the 1782  
15 application was made. Finally, he concluded that as  
16 you heard from the excerpt read by Mr. Keats, the  
17 evidence was really sought in a different proceeding.

18 Your Honor, that's not the situation here,  
19 and the reason why the Conell case wasn't highlighted  
20 by us is that that was a case brought by different  
21 parties, not by Alpene, and the reasoning and  
22 resolution of that case is far different from here  
23 because Mr. Conell had testified already. Ms. McCaul  
24 had not, other than in the declaration she submitted.

25 Your Honor, with respect to the legal issue

1 on the foreign tribunal, as you know, as part of 1782,  
2 one of the requirements is that the proceeding is  
3 before a foreign or international tribunal. The law of  
4 the Second Circuit is quite clear, your Honor, as made  
5 most recently in the Alexa Partners case, that an  
6 investment treaty arbitration like this one qualifies  
7 as a foreign or international tribunal. Now, cert. was  
8 granted in that case but the issue to be resolved by  
9 the Supreme Court really does not -- will not dispose  
10 of this issue.

11           The longstanding debate in the law over  
12 investment -- international arbitration and 1782 is  
13 whether 1782 is available to private, commercial  
14 arbitrations, that is not investor state cases but  
15 private cases that have no governmental aspect to it.  
16 The law is split on that. The Second Circuit for  
17 example does not allow 1782 examinations in that  
18 context whereas other circuit like the Sixth Circuit  
19 do. But with respect to investment treaty arbitration,  
20 as best we can tell, your Honor, there is no case from  
21 a circuit that says 1782 is not allowed in investment  
22 treaty arbitration.

23           In our case, it's even closer and stronger  
24 to there being no doubt about 1782 being allowed  
25 because in our case, the arbitration is connected -- is

1 done under the auspices of the World Bank's ICSID  
2 division, and that shows that it's a quasi-government  
3 agency, which to us fully satisfies the requirements  
4 set forth in the Gwyo (ph) case, which is another  
5 Second Circuit case dealing with this 1782 question.  
6 In that case, the Second Circuit ruled that 1782 was  
7 not available because it was essentially a private  
8 arbitration. Here, it is a case against the state in  
9 which a quasi-government is involved.

10 So, your Honor, we would submit that this  
11 case will not be decided or impacted by the issue  
12 that's before the Supreme Court because the issue that  
13 cert. was granted on is whether an ad hoc arbitration  
14 to resolve a commercial dispute between two parties is  
15 a foreign or international tribunal under 1782, where  
16 the arbitral panel does not exercise any governmental  
17 or quasi-governmental authority. That's the issue on  
18 which cert. was granted. Here, it's not an ad hoc  
19 arbitration, it's an arbitration pursuant to ICSID, and  
20 the arbitral body does have governmental or quasi-  
21 governmental authority.

22 So we would submit, your Honor, there's no  
23 reason to delay the resolution of this pending the  
24 outcome of that case, and it would be prejudicial to  
25 Alpene to delay this discovery. As I said, there will



1 be a procedural conference in February. We'll likely  
2 have submission of evidence by the spring or summer,  
3 probably May or June, so we would want to have the  
4 testimony of Ms. McCaul. And as you can see from our  
5 request, it's limited to five topics, two requests for  
6 production of documents. This is not burdensome. It  
7 can be done quickly, and we would submit it should be  
8 done and is allowable under the law. Thank you, your  
9 Honor.

10 THE COURT: Any response from Ms. McCaul's  
11 counsel?

12 MR. DAVISON: Yes, please, thank you. I  
13 appreciate it, your Honor. So let me talk about the  
14 foreign proceeding piece. I think that the Supreme  
15 Court's grant on this issue is something they reached  
16 out for, particularly on the foreign arbitration piece.  
17 I think if you look at the foreign treaties, the treaty  
18 arbitrations, they always involve a government setting  
19 it up. That's the whole point. The Gwyo test I  
20 suspect will be hotly contested and debated in the  
21 Supreme Court as to what falls on the side of a private  
22 arbitration versus what falls on the side of a  
23 government-sponsored one. So I actually disagree  
24 respectfully that that issue is not going to be  
25 addressed and resolved. It's an important issue

1 because we're talking about sovereign nations and  
2 whether or not they had a reason to expect U.S.  
3 discovery in their proceedings.

4 As for the -- let me talk about the breadth  
5 of the request. They didn't list out their request the  
6 way they did in the New Hampshire case, where there's  
7 20 or 30 requests for information. But what they in  
8 the deposition notice, if you look, the last request is  
9 information regarding the allegations made by Alpene in  
10 its ICSID proceeding against the Republic of Malta.  
11 That's everything.

12 So I think it's just artful drafting that  
13 they recognized the last time around Judge DiClerico  
14 listed out all those requests to show how burdensome  
15 they were. But all they've done here is just put a  
16 catchall that covers the same ground. It's pretty  
17 clear from the presentation you heard here today that  
18 they intend to cover all that ground, so I don't think  
19 it's that narrow or unintrusive. I think that's a  
20 mischaracterization.

21 And I still haven't heard any good reason  
22 for not talking about the decision, other than it's a  
23 bad decision for them and they're just trying to get  
24 through Ms. McCaul what they couldn't get from Conell.  
25 I think it's notable that nobody appealed the Conell

1 decision. I think it's notable that nobody's gone  
2 back, you know, because I think they probably  
3 recognized that that judge has made up his mind, so  
4 they're taking a shot at someone who is further removed  
5 and it's just -- as I said, one can question what this  
6 is all about, what the real reasons are here given how  
7 tangential what they're seeking is to the ultimate  
8 issues at hand. What Ms. McCaul has to say about the  
9 proposal to use Mr. Conell has no real bearing on an  
10 expropriation claim. It's hard to even say it with a  
11 straight face, frankly.

12           And as for her, you know -- I think if you  
13 look at the documents that were submitted -- they seem  
14 to have a lot of emails by the way. Notably, not one  
15 single email has Ms. McCaul in it, not a single email  
16 is copying Ms. McCaul, is from Ms. McCaul, and they've  
17 clearly have had discovery and email from other sources  
18 elsewhere, and there's nothing. The allegation that  
19 she was directing this is unsupported; it is false.  
20 The reference to an email about a KYC, where they're so  
21 surprised someone is doing KYC in a bank, this is a  
22 bank that was -- whose assets were frozen. Assume when  
23 a bank's assets are frozen the depositors want their  
24 money back. Before you give money back to someone who  
25 might be a criminal, which is why you do KYC, you do

1 due diligence to figure out who they are before you  
2 release that money. That's what they're doing. She  
3 wasn't directing it.

4 I will simply say and I have told -- we and  
5 Alpeine tried to talk through these issues before. She  
6 was dealing with a personnel issue of someone who was  
7 having a dispute working for Mr. Conell, who did not  
8 want to continue, and she persuaded him to finish his  
9 job, but she did not direct the traffic. It is also  
10 true to get Mr. Conell's -- this happened very quickly,  
11 right? Mr. Sader was arrested on March 18<sup>th</sup>, 2018 or  
12 March 19<sup>th</sup>, one of those two days. I apologize, I might  
13 be off a day. The Maltese regulators really had little  
14 choice but to remove him, who was -- you know, it took  
15 two years. This isn't something that got resolved  
16 overnight.

17 For two years, Mr. Sader was fighting these  
18 charges. I have no comment on the proceedings.  
19 Obviously, it speaks for itself that the charges were  
20 dismissed but you have to evaluate the MFSA's actions  
21 in real time, what they knew, when they knew it. The  
22 notion that somehow -- I think in part of the  
23 presentation, they suggested that Promontory was  
24 involved in seizing the bank. I mean, that's just  
25 ludicrous. We obviously -- we recommended someone who

1 we knew, who had a long history publicly -- it's all in  
2 the record -- of being a bank regulator himself, and he  
3 was asked to a difficult job in a very short time  
4 frame, and we agreed to give personnel to get him set  
5 up for the first week or so of his office, which we  
6 did, which we were paid for but we were not -- we were  
7 not directing what he did. He was taking his direction  
8 from the MSFA.

9 Frankly, if they want to get -- they're  
10 going to be litigating these issues. They will be able  
11 to get in their proceeding the precise reasons why  
12 Malta seized the bank. They will have the discovery  
13 they want in that proceeding, and there's just no basis  
14 or reason for going to someone who is very far removed,  
15 who was not involved, when they actually did try to go  
16 to the person who was and failed, you can't just get  
17 through the back what you couldn't get through the  
18 front. That I submit respectfully is what they're  
19 trying to do here. Thank you.

20 THE COURT: All right. Well, this is  
21 obviously a complex case, both factually and legally.  
22 I do have a few questions. I think you may have  
23 answered some of them already so let's start with the  
24 last one, which is, can the substance of the  
25 information that's sought from Ms. McCaul be requested

1 directly from Malta or the MFSA through the  
2 arbitration? In other words, is there another source  
3 of the information that they're looking for from Ms.  
4 McCaul. Let me start with Alpene.

5 MR. DAVISON: Yes, your Honor, thank you.  
6 The short answer to your question is no. Discovery in  
7 these investment treaty arbitrations is largely  
8 voluntary. There's certainly information we can get  
9 from Malta through a request for production and things  
10 like that. We will get emails that they have on their  
11 end. We will not be able to take Ms. McCaul's  
12 deposition, nor will we have free reign like in an  
13 American case over which Maltese representative we can  
14 take discovery of.

15 There's ICSID rule 34, which says that the  
16 tribunal may call upon the parties to produce  
17 documents, witnesses, and experts, but the ICSID has no  
18 compulsory power to compel the attendance of witnesses  
19 like your Honor would. There's the ability to obtain  
20 documentary evidence from Malta, but the ability to  
21 obtain witnesses is largely based on who Malta presents  
22 to us. In other words, if they present witnesses at a  
23 hearing or present a witness statement, we could cross-  
24 examine and examine that witness. If they don't  
25 present that witness or bring that witness, we have no

1 real means to compel that witness to attend. We have  
2 no ability to get the information we seek from Ms.  
3 McCaul through the arbitral process. Discovery is  
4 famously limited and often classified as not American-  
5 style discovery and as a result, our ability to get  
6 this information through the arbitral process is  
7 essentially very limited if it exists at all, which is  
8 why we are here, your Honor.

9 THE COURT: And if you were to take Ms.  
10 McCaul's deposition, how long would it take? How much  
11 time are you looking for?

12 MR. DAVISON: I would say it's just a few  
13 hours. I mean, we really want to know what happened  
14 when Mr. Conell was appointed. He says in his  
15 deposition that she was the primary point of contact  
16 for him at Promontory and that she briefed him for  
17 several -- she and others from Promontory briefed him  
18 for several hours. And as the record shows, there was  
19 involvement, sporadic involvement thereafter by Ms.  
20 McCaul, including this know-your-customer email from  
21 September of 2018, in which the employee says he  
22 promised Ms. McCaul he would finish the review of the  
23 customers' KYC.

24 So we are -- we don't want to burden her  
25 unduly. We're certainly willing to do this deposition

1 remotely, via Zoom, whatever is a limited intrusion on  
2 her. We can limit it to a few hours. We really have  
3 just key questions about this beginning and what  
4 happened because as you've seen from our request for  
5 arbitration and my discussion today, your Honor, what  
6 happened at the beginning and how these assets were  
7 taken and why is really critical to our case, and the  
8 Promontory and Ms. McCaul aspect of this on the front  
9 end is very important. Thank you, your Honor.

10 THE COURT: So if you were to write up or  
11 explain what your dream testimony would be, the most  
12 helpful testimony you could get from Ms. McCaul, what  
13 would it be, if you were to fill in the blanks as to  
14 what it is that would be most useful to you?

15 MR. DAVISON: It would be the contact she  
16 had with MFSA, that is the Maltese financial  
17 regulators, on why they reached out to her for this,  
18 what she said to them, what she briefed Conell about,  
19 what the instructions Conell received were, and how  
20 they went about their business, and what considerations  
21 if any did they give to the shareholder Alpene during  
22 this process. And then over the -- and what role if  
23 any did she have after the appointment of Conell in  
24 either advising him, continuing discussions with him,  
25 or continued discussions with MFSA about Alpene.



1           THE COURT: What would be the most probative  
2 for you as an answer to those questions?

3           MR. DAVISON: That the actions were -- that  
4 there wasn't a regard to the Alpeine shareholder  
5 interest in taking this over, that there were no other  
6 regulatory issues with respect to the bank, and that  
7 this -- that the assets of the bank were seized solely  
8 based on this indictment of Mr. Sader, and that the  
9 bank was otherwise in good order and good shape, and  
10 that the MFSA essentially directed them to take over  
11 the bank given the state of affairs.

12           To us, that would be very probative of our  
13 claims of expropriation and unfair and discriminatory  
14 treatment as a foreign investor, which is the basis for  
15 these claims, that is the foreign investor is treated  
16 in an unfair and discriminatory way vis a vis a Maltese  
17 investor, so that we would want to ask how -- what they  
18 thought of Alpeine, how they came to their conclusions,  
19 and how -- if Ms. McCaul had any information from MSFA  
20 about why they did this and why they didn't give any  
21 process to Alpeine through this takeover of the bank.

22           Remember, your Honor, when this happened,  
23 all the shareholder rights, all the rights and all the  
24 deposits were seized. I mean, the deposits which  
25 belong to others were seized and are in the possession

1 of the Maltese government. You know, what information  
2 does she have about that? How did this come about?  
3 Was that part of the mandate that they were to exercise  
4 because that's what Conell ended up doing as the  
5 competent person essentially running the bank.

6 THE COURT: And her putting forth Conell's  
7 name, what is it that you hope to get from her  
8 deposition with respect to that? You know, Ms. McCaul  
9 says it wasn't her decision, she just gave some names.  
10 Are you looking for her to somehow say that she  
11 instructed Conell what to do or that she knew that he  
12 would fit the agenda that the Maltese government had?  
13 What is it you're looking for her to say there?

14 MR. DAVISON: Yes, your Honor. I mean,  
15 we're trying to find out whether that was -- whether  
16 that was the objective. This would be a discovery  
17 deposition in which we would be seeking to prove that  
18 part of our claim and to ascertain as to the motive of  
19 MFSA and what was communicated to Ms. McCaul through  
20 that, and why Conell was picked and what his mandate  
21 was.

22 THE COURT: Would any of the evidence that  
23 you hope to collect from Ms. McCaul be obtained in the  
24 ICSID and if so, how would it be used?

25 MR. DAVISON: I'm sorry, would it be

1     obtained in what proceeding?

2                   THE COURT:    Would it be admissible in the  
3     proceeding --

4                   MR. DAVISON:   Would we be able to use it in  
5     our arbitration?

6                   THE COURT:    Can you use it or is it merely  
7     just to give background and help you frame your  
8     arguments?

9                   MR. DAVISON:   It would be information that  
10    we would hope to use in our arbitration.   We would  
11    certainly think it to be relevant and admissible in the  
12    arbitration.   It is an effort to obtain evidence that  
13    we would use in that arbitration because if the  
14    evidence is what we suspect it to be, she would -- that  
15    evidence would be probative of our claims of  
16    expropriation and unfair treatment.   So it's not -- I  
17    say it's discovery in the sense we don't know the  
18    answers to the questions, but the ultimate objective is  
19    to use this evidence in the arbitration.   It's not a  
20    "fishing expedition," it's a very carefully tailored  
21    search for evidence that we would use in the  
22    arbitration.

23                   THE COURT:    And you believe it would be  
24    admissible?

25                   MR. DAVISON:   Yes, we do, your Honor.

1 THE COURT: Okay.

2 MR. KEATS: Your Honor?

3 THE COURT: I just have a couple of other  
4 questions and then I'll get to you.

5 MR. KEATS: Sure, sorry.

6 THE COURT: Remind me what the status is of  
7 the arbitration at this point.

8 MR. DAVISON: The arbitration was filed over  
9 the summer. It was registered by ICSID, which means it  
10 was accepted. There's a somewhat laborious process to  
11 pick the arbitrators. We now have -- each side  
12 nominated an arbitrator, and then the parties  
13 collaborated on picking a president. That process was  
14 included in December so that we have a president and  
15 two arbitrators, so the three-person panel has been put  
16 together. ICSID just communicated with us about the  
17 initial procedural conference, which they suggested  
18 some dates in late February.

19 At that conference, a schedule will be put  
20 together, and as typical in these cases, it would  
21 require us to submit our initial what they call  
22 memorial, a sort of opening brief with evidence,  
23 probably in May or June or so, with the other side's  
24 response probably three months after that, and then a  
25 hearing hopefully before the end of the year or

1   sometime early next year. The critical date for us is  
2   likely to be requirement to submit our memorial with  
3   evidence by May or June would be my estimate, your  
4   Honor.

5           THE COURT: And if the Court were to stay  
6   its decision on this pending the Supreme Court's  
7   ruling, how would that affect your position in the  
8   arbitration? I assume you could request a sixty-day  
9   extension or whatever, a brief extension?

10          MR. DAVISON: If your Honor did that and the  
11   court rules on its issue, it would announce its  
12   decision I assume by June of this year, that is the  
13   Supreme Court. I don't know whether the arbitral panel  
14   would allow us to delay our submission pending the  
15   outcome of that. We might be precluded from using her  
16   or if the issue goes the way I suspect it will, it  
17   won't impact your Honor's decision. And at that point,  
18   we'd be seeking to have her deposition sometime over  
19   the summer, I would suspect, as opposed to over the  
20   spring, which would be our desired outcome so we could  
21   use it in our likely upcoming submission.

22          THE COURT: But if there were newly-  
23   discovered evidence that was provided, is there some  
24   provision to either request time in the scheduling to  
25   supplement your memorial or how does that work?

1 MR. DAVISON: We could certainly ask, your  
2 Honor. I mean, what would likely happen is, let's say  
3 there was a schedule set and there was additional  
4 evidence we obtained. We would need to delay the  
5 schedule, probably move off the hearing, which is an  
6 issue because with these busy arbitrators and lawyers,  
7 once you have a hearing scheduled, if you want to  
8 reschedule it, it often takes quite a while to get back  
9 on to everyone's docket. So that if this decision were  
10 delayed, it would likely impact a delay on the schedule  
11 of the ICSID case, and we would be at our own peril  
12 about whether the panel would allow itself to have  
13 later discovered evidence submitted, and then the other  
14 side would get a chance to respond to that as well.

15 But without rehashing, your Honor, as I  
16 stated in my argument, I think the Second Circuit law  
17 is clear and I think the issue that the Supreme Court  
18 is going to decide is not -- will not impact the issue  
19 before you, but that's another issue. But as to your  
20 question, I think a delay would impact our schedule,  
21 would potentially preclude us from using this evidence,  
22 but frankly more likely would result in a delay of the  
23 schedule, which would be to our detriment to push this  
24 off farther.

25 THE COURT: Okay, thank you.

1 Can I hear from Ms. McCaul's counsel?

2 MR. KEATS: Yes, thank you. So let me talk  
3 about -- I'm going to go in reverse order because  
4 that's just the way it worked out. You know, the fact  
5 is, there's no schedule right now. They know now that  
6 this is an issue. They can build this into their  
7 schedule. Nobody is pushing to have this thing. This  
8 thing is not going to be heard before June or July.  
9 They have made the decision to seek this testimony.  
10 Everybody knows about it. The government of Malta  
11 knows about it. They can simply do their schedule in  
12 accordance with what they understand, which is it's  
13 already January, the parties in the underlying Supreme  
14 Court cases will brief their arguments the next few  
15 months, and there will certainly be decisions by June,  
16 if not earlier. It's hard to see any prejudice but I  
17 can see a lot of wasted time and resources because,  
18 frankly, there might be further proceedings here that  
19 delay things anyway depending on how things come out  
20 for either side. So that's just by the by.

21 Let me talk a little bit about -- your Honor  
22 was asking what their ideal testimony was. I have to  
23 say two things: One, the notion that their entire  
24 expropriation/differential treatment/discriminatory  
25 claim turns on Elizabeth McCaul and her conversations

1 to bring Lawrence Conell over, having recommended by  
2 the way, the record will show, many people, not just  
3 him, is hard to swallow. Their whole case cannot  
4 possibly turn on that. They're making it all about a  
5 very short series of interactions and conversations.

6 And, again, they're treating it as if  
7 Promontory or Elizabeth somehow decided to put this  
8 bank in administration, which they did not. Frankly, I  
9 understand the complaints that Alpene is lodging but a  
10 bank that has a chairman and a sole shareholder who has  
11 been arrested for money laundering in the United  
12 States, any reasonable banking regulator would conclude  
13 that you have to put the bank in administration. It is  
14 not a particularly shocking action on facts like that,  
15 but they can litigate that. That's their right.

16 But to that point because I think -- I'm  
17 certainly struggling and I think we're all struggling  
18 to understand how any of this has any bearing on the  
19 claims. I'll just put you point back to Judge  
20 DiClerico's case. If you look again in his opinion,  
21 they had many of the same claims. One of them was a  
22 claim that the principle of proportionality was  
23 infringed. One of them is that the principle of equal  
24 treatment and non-discrimination was infringed. It's  
25 the same claims and, again, the judge concluded that



1 the testimony they sought from Conell, who actually did  
2 the work, right, who has the knowledge of what the MFSA  
3 directed him and didn't direct him to do, even there  
4 they concluded it had no bearing on those claims, and I  
5 still think that that is absolutely the right decision.

6           There's one other issue that's lurking in  
7 this that we haven't talked about today, which is,  
8 we're talking about a bank regulator and their  
9 consultant. So in the U.S. -- we're all more familiar  
10 with it -- government agencies use consultants all the  
11 time. It is not -- generally speaking, the  
12 communications between an agency and their consultant  
13 in this country are not discoverable. They are part of  
14 the deliberative process privilege and you may have  
15 heard the phrase the consultant's corollary to the  
16 deliberative process privilege, which basically means  
17 that that deliberative process privilege would usually  
18 apply to a consultant.

19           Malta has written to us, and it's in the  
20 record and it's attached to my declaration, that  
21 Elizabeth worked as a consultant to the MFSA.  
22 Remember, she was never retained by the bank.  
23 Promontory was never retained by Pilatus Bank.  
24 Promontory's only client was the MFSA, and all their  
25 work going back to 2012, which by the way, these

1 plaintiffs intend to explore in their deposition --  
2 they say it in their brief. It's footnote 2, page 4 of  
3 their brief, in which they say, "Ms. McCaul's assertion  
4 is that she has been involved with the MFSA since at  
5 least 2012," which by way is a mischaracterization and  
6 we'll come back to that, is one of the topics of her  
7 subpoena. "Alpene requests to inquire as to the extent  
8 of her previous relationship with the MFSA chairman and  
9 deputies and agents."

10           So far from being narrow discovery, and  
11 you've heard that as you asked him what are they going  
12 to ask about, it kept getting broader and broader.  
13 We're talking about 2012 to the present, okay? We're  
14 talking about, according to their notice, anything  
15 that's alleged in the arbitration demand against Malta.  
16 This is the ultimate fishing expedition. It's clearly  
17 a fishing expedition.

18           I will simply say, I notice they haven't  
19 denied what I said at the outset, which is, boy, this  
20 sounds a lot more like pre-suit discovery against  
21 Promontory, which is not a proper purpose for a 1782  
22 petition. And I'm sorry, the lack of transparency  
23 throughout makes me pause. They have not denied it. I  
24 don't care if they deny it now but they have not denied  
25 it. That is what I'm worried about. That is why I

1 have two Promontory -- IBM lawyers. Promontory is a  
2 division of IBM -- on the phone with me because that --  
3 they have made every sound but that's really what this  
4 is about, and they shouldn't be allowed to get away  
5 with it.

6 Let me talk about the Supreme Court  
7 proceeding for a second. I don't bet on what the  
8 Supreme Court does. Those are bets you lose. All I  
9 can say is, this is a court that reached out for an  
10 issue that was not before it. The Solicitor General  
11 urged them to do so. They took up the issue. It  
12 raises huge, huge comity issues with our allies and  
13 other foreign nations to allow this kind of discovery  
14 out of respect for the sovereignty of the government of  
15 Malta, frankly, I think we all owe it to let the  
16 Supreme Court decide if this discovery is appropriate  
17 on these circumstances because it's intrusive.

18 And we're talking about now a consultant to  
19 a regulator, who we're about to let ask -- a party that  
20 was subject to their regulatory scheme. We're about to  
21 let them ask about communications between that  
22 regulator and their consultant, and that is a big,  
23 significant issue. It shouldn't be -- it's not one  
24 that should be taken lightly because it's going to  
25 create issues throughout that we're going to have to

1 decide whether or not a question is or is not in  
2 bounds. They have couched it -- it's all about the  
3 relationship and on its face, it's not appropriate. In  
4 any event, we ought to give the Supreme Court a chance  
5 to see whether they think is even within the ambit of  
6 the statute. Thank you.

7 THE COURT: Okay, thank you. I agree with  
8 you, I'm not going to try to predict what the Supreme  
9 Court is going to do, even if I understand why they  
10 took cert. Okay, I think I've heard all I need to  
11 hear. I am seriously considering that it may well make  
12 sense to stay this case until we hear -- we get  
13 guidance from the Supreme Court, because if the Supreme  
14 Court finds that 1782 does not apply to commercial or  
15 investment treaty arbitrations, then it appears the  
16 litigants would not be permitted to use U.S. district  
17 courts if they wish to compel discovery from a witness  
18 located in the U.S., and this petition would be moot.  
19 So predicting what the outcome would be or how nuanced  
20 it would be is something that I wouldn't even presume  
21 to do at this point.

22 So unless there's anything else that anyone  
23 wants to add at this point, I thank you for your well-  
24 briefed submissions and your intelligent arguments.  
25 Anything else from Alpene?

1           MR. DAVISON: Your Honor, the only thing I  
2 would add in parting is that we don't believe the issue  
3 that's in front of you is actually in front of the  
4 Supreme Court because the issue that was granted cert.  
5 on is where the arbitral panel does not exercise any  
6 governmental or quasi-governmental authority. Again,  
7 your Honor, I take your point that we can't predict  
8 exactly what the Supreme Court will do for sure, but  
9 that the issue -- the case that it's front of it does  
10 not involved an arbitral panel that has quasi-  
11 governmental authority like the one we have, which  
12 involves the World Bank, which is clearly a quasi-  
13 governmental authority. That's the only thing I would  
14 add, your Honor, as you think about whether to grant a  
15 stay or not.

16           THE COURT: Okay. But the court granted  
17 cert. on the question of whether the phrase "foreign or  
18 international tribunal" in 28 U.S. Code 1782A would  
19 include international arbitral tribunals constituted  
20 pursuant to a treaty signed by two or more sovereign  
21 states. That is what the Court is going to be looking  
22 at, correct?

23           MR. DAVISON: I believe there's a clause in  
24 there, too, that says where the arbitral panel does not  
25 exercise any government or quasi-governmental

1 authority.

2 THE COURT: Okay.

3 MR. DAVISON: That I think with that  
4 qualifier is the precise issue in front of the Court,  
5 your Honor.

6 THE COURT: Okay, great. That qualifier  
7 that you inserted, is that critical and does that  
8 change the way I should look at this?

9 MR. DAVISON: I think so, your Honor,  
10 because in the case that the Supreme Court took from  
11 the Second Circuit, the panel there was an ad hoc  
12 panel, which means it was not constituted pursuant to a  
13 governmental agency. Here, the panel is the World Bank  
14 ICSID panel -- ICSID agency, which does have such  
15 power, so we would submit that that's the difference,  
16 your Honor, that our case is further removed from what  
17 the Supreme Court is considering from the Alexa  
18 Partners case, the Second Circuit case.

19 THE COURT: And what about the ZF Automotive  
20 case that was consolidated with it? Does that --

21 MR. DAVISON: That's a purely private  
22 arbitration. The Supreme Court will undoubtedly  
23 resolve the question about whether -- that currently  
24 has the Second Circuit split about whether in a purely  
25 private arbitration, 1782 is available. In the Second

1 Circuit, a purely private arbitration that is not  
2 involving a government or an investment treaty cannot  
3 use discovery, 1782 discovery. Other circuits like the  
4 Sixth Circuit say you can, and that's the case that  
5 that issue will be decided. The court took this  
6 additional case, that is the Second Circuit case, to  
7 decide the question of an investment treaty  
8 arbitration, in which the panel does not exercise any  
9 governmental or quasi-governmental authority, is 1782  
10 available there?

11 THE COURT: Okay.

12 MR. KEATS: Your Honor, if I could just  
13 respond. Ingrafted in the Second Circuit decision is  
14 the Gwo test, which is I'll call it a sliding-scale  
15 test. I believe that test will be very much examined  
16 by the Supreme Court, and the question of whether or  
17 not the factors that were just described tips the  
18 balance and what degree of control is required will  
19 almost certainly be addressed by the court. So I just  
20 respectfully disagree.

21 THE COURT: Okay, all right. Well, I guess  
22 we'll all be listening to the argument regardless of  
23 what happens. Okay, thank you all.

24 MR. DAVISON: Thank you, your Honor.

25 THE COURT: That concludes this argument.

1                   MR. KEATS: Thank you, your Honor. I  
2 appreciate it.

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18 I certify that the foregoing is a correct  
19 transcript from the electronic sound recording of the  
20 proceedings in the above-entitled matter.  
21

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25 ELIZABETH BARRON

January 14, 2022